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IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION (CIVIL) NO. 494 of 2012, 797 of 2016 & 342 of 2016

K.S. Puttaswamy(Retd) & Anr. ... Petitioners

Versus

Union of India & Others. ... Respondents

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT/ STATE OF GUJARAT BY RAKESH DWIVEDI, SENIOR ADVOCATE.

1. This larger Bench of Supreme Court of India has assembled to decide the issue of existence of Fundamental Right of privacy in Article 21 or Part III as a whole and its contours (as far as possible) in the context of an apparent conflict between previous judgments and the matrix of Aadhar Act. The Aadhar Act requires a limited identity data disclosure for maintaining a data base, only and solely, for identification purposes with an express stipulation of non- transferability. Protection and safeguards include punitive measures. In short, limited use for identification and non-transferability with punitive safeguards is the hallmark of Aadhar Act. It does not seek to profile any person. The question therefore is - " Is there a right to privacy in public domain? " What is the extent?" "Whether data for mere identification would involve a privacy right?" "What are the limitations of the State?"

2. **<u>TWO CAVEATS :</u>**

A. The majority view in ***Kesavnand Bharti Vs State of Kerala (1973) 4 SCC 225*** is that the fundamental rights are not natural rights or inalienable rights. (extracts are enclosed as **Annexure-A**) ***[Compilation RD Vol. III Tab R)*** . Even if one goes by the doctrine of basic structure they are certainly

important but they can be abridged though they cannot be destroyed or emasculated.

(2007) 2 SCC1 I.R. Coelho Vs State of T.N. Pr 82

B. Reference to "minimal governance" concept should be eschewed. It should be sufficient and appropriate to say governance as per Constitution. That ensures respect for fundamental rights. Plea for " Horizontal Protection" and " minimal governance" are somewhat contradictory.

Binoy Viswam Vs UOI (2017) SCC Online 647*[Compilation RD Vol. III Tab UVW)*

> **"96.** *Having said so, when it comes to exercising the power of judicial review of a legislation, the scope of such a power has to be kept in mind and the power is to be exercised within the limited sphere assigned to the judiciary to undertake the judicial review. This has already been mentioned above. Therefore, unless the petitioner demonstrates that the Parliament, in enacting the impugned provision, has exceeded its power prescribed in the Constitution or this provision violates any of the provision, the argument predicated on 'limited governance' will not succeed. One of the aforesaid ingredients needs to be established by the petitioners in order to succeed."*

I. DYNAMICS OF PRIVACY

1. Article 21 talks of Life and personal Liberty in conjunction. Our Court has construed 'Life' as not limited to body and limbs. In fact post birth the most important aspect of life is its protection, growth and development until demise. Therefore the dynamics and dialectics, of 'Life' is important. And if 'Privacy' is read into Article 21, as it should be to an extent, then the same would be true of 'Privacy'.

2. Life and Privacy in "Tribal Society", "Feudal Society", "Industrial Society", and "Techno-Industrial Society" would have different dimensions. So also it would vary from a Colonial State to a modern Democratic Welfare

State. This is more so in the context of claims of anonymity, autonomy and identity.

3. Primeval Societies existed disconnectedly, isolatedly and in small group existence. There was little need for building wide complex relations. But, leaving the tracing of intermediary growth of societies, the modern technological societies afford an opportunity to build wide network of relations which are social, political and economical. Individuals have to relate with state too. Our growth and development depends on such relations. Today's society is therefore founded on interconnectivity and seeking of opportunities. And today's state also has grown more complex with its Welfare Activities dimension, need for taxation, and growing use of Banks in commerce, as also growing crime and terrorism.

4. In today's society if someone wants to be completely anonymous and autonomous and does not want to disclose his identity at all then he has to turn a recluse. In the modern society the normal proclivity of an individual is to widen his network and enter into variety of relations and seek the benefits and services both from private service providers and the government and public bodies. Therein lies his growth and development sanctified by Article 21 of the Constitution. The necessary fall out of the man setting out of his home for the aforesaid purpose is that he has to disclose certain minimum information about his identity. Non disclosure of identity or complete anonymity in these circumstances is not possible. To illustrate:-

(i). If someone wishes to marry he/ she would have to disclose who they are and what they do. May be they would have to at least state that they are not suffering from communicable or serious diseases.

(ii). if someone seeks an employment in the private/ public or government sector , he would , per necessity have to disclose his identity and may be antecedents too. He may also have to agree to biometric attendance.

(iii). Every professional working in an institution would have to disclose his minimum identity data with photograph for his recognition/ identification, and also blood group which would enable the institution to help save his life in the event he needs blood.

(iv). Every individual who wants to operate a smart phone or internet and wishes to download/ operate applications and engage in e commerce or e banking , would have to disclose his minimum identity in the form of name, date of birth, telephone number, email address and the residential address.

(v). Every voter has to identify himself before casting his vote by means of showing his voter identity card, which would have certain details of identity of person including his photograph.

(vi). Similarly, a candidate seeking to contest has to disclose his personal details such as income, assets and liabilities of himself and that of his spouse, criminal antecedents etc.

PUCL VS UOI (2003) 4 SCC SCC 399[Compilation RD Vol. III Tab XYZ)

5. The aforesaid are merely some instances to show that the building of social, economic and political relations, engaging in commerce/ e commerce and engaging with government/ public institutions would require minimum identity data for recognition and identification. Disclosure of thumb impressions and photographs has also become indispensable. <u>In short, there can be no reasonable expectation of privacy in the disclosure of such and other similar data for identification.</u> In other words, in the modern society the very growth and development of the individual would not admit a privacy claim in disclosure of data for identification.

6. The people with whom an individual relates, also have an identical interest in right to life and personal liberty and Article 14 & 19 which give them the right to know or right to information. When an individual deals with an individual, or deals with a collectivity of individuals under an institutional umbrella then Article 21 also would impose a requirement to disclose identity information.

II. CONSTITUTIONAL EXISTENCE OF THE FUNDAMENTAL RIGHT TO PRIVACY :

1. Claim to privacy cannot be considered to be a Fundamental Right under the Constitution of India in generality and abstraction. Every claim to privacy in a non-penumbral zone of a specified fundamental right, must in the first instance be established as a Fundamental Right under Article 21 of the Constitution. The establishment would require assessment of whether the subjective expectation of privacy of the claimant is one which court would objectively consider to reasonably be legitimate. In this regard this court will also consider the context and the spatial domain (private or public) in which the claim of privacy is seeking recognition as a fundamental right. This approach is being followed in USA, UK and by European Court of Human Rights.

2. A reference was made to Preamble and Part III rights to show that there is a right to privacy under the Constitution. But it is more important to ascertain from the substantive text what is that right outside the penumbra of the specified fundamental right [Article 14, 19, 20(3), 25]. Where a claim of privacy is asserted to fall within the penumbra of a specified fundamental right enshrined in Part III, like Article 14 , 19, 20(3) and 25 (1), the claim would merely be recognized as the specified fundamental right, and the same would have no de hors existence. Its infringement would be tested on the anvil of those Fundamental Rights alone. Of course, if the claim falls in penumbra of

more than one Fundamental Rights then the infringement would have to be tested with respect to limitations regarding both Fundamental Rights, as per ***RC Cooper*** doctrine **[(1970) 1 SCC 248]**. The fact that a privacy claim falls in the penumbra of a specified Fundamental Right, does not necessarily imply that there is generally a Fundamental Right to privacy under Article 21 and the same is inalienable.

3. It is instructing to refer to what is held in ***Maneka Gandhi Vs. Union of India (1978)1 SCC 248*** in the context of freedom of speech and expression of the Constitution. This court observed as below :-

(Pg. 306-307):-

*"**29.**.It is not enough that a right claimed by the petitioner flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible otherwise to effectively exercise that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon the nature of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. If this be the correct test, as we apprehend it is, the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression".*

> *"**33.** We cannot, therefore, accept the theory that a peripheral or concomitant right which facilitates the exercise of a named fundamental right or gives it meaning and substance or makes its exercise effective, is itself a guaranteed right included within the named fundamental right".*

III REASONABLY LEGITIMATE EXPECTATION OF PRIVACY

4. It follows that there cannot be a broad and general definition of privacy and privacy interest must also be placed in the context of other rights and values. A privacy right claimed in a context must be a Fundamental Right

implicit in the concept of life and personal liberty in Article 21. In **Gobind Vs State of M.P. (1975) 2 SCC 148** this court relied on **Griswold Vs Connecticut 381 US 479** where the U.S. Supreme Court observed as follows :

> ***"22.*** *There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right,a law infringing it must satisfy the compelling State interest test.".*

5. The US Supreme Court has consistently held that the court must first find that a claimed right is entitled to protection as a Fundamental Privacy Right :

(i). In **US Vs Mitchell Miller 425 US 435 = 48 L Ed 2d 71 (1976) [Bank Documents]** ***[Compilation RD Vol. I Tab A)*** the court observed :-

> " *We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate expectation of privacy concerning their contents"* (Pg 78-79)

(ii). In **Michael Lee Smith Vs State of Maryland 442 US 735 = 61 L Ed 2d 220 (1979) [Pen Register],** ***[Compilation RD Vol. I Tab B)*** the court observed " *this inquiry as Mr. Justice Harlan aptly noted in his Katz concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," 389 US, at 361, 19 L.Ed 2d 576, 88 S Ct 507-whether, in the words of the Katz majority, the individual has show that "he seeks to preserve (something) as private". Id. At 351, 19 L.Ed 2d 576, 88 S Ct 507. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,' "Id. at 861, 19 L Ed 2d 576, 88 S Ct. 507-whether, in the words of the Katz majority, the individual's expectation, viewed objectively,is "justifiable" under the circumstances."* (Pg 226-227).

(iii). In **California Vs Greenwood 486 US 35 = 100 L Ed 2d 30 [garbage]** ***[Compilation RD Vol. I Tab C)*** it was observed "*an*

expectation of privacy does not give rise to IVth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable" (Pg 36)

(iv). In ***New York Vs Class 475 US 106 = 89 L. Ed 2d 81,[car] [Compilation RD Vol. I Tab D)*** it was observed :

> *"Nonetheless, the State's intrusion into a particular area, whether in an automobile or elsewhere, cannot result in a Fourth. Amendment violation unless the area is one in which there is a "constitutionally protected reasonable Expectation of privacy".*

6. The doctrine of reasonable expectation of privacy has also been consistently applied in U.K (See ***R (Wood) Vs. Commissioner of Police of the Metropolis (2010) 1 WLR 123=[2009] 4 ALL ER 951 (Pr 17- 25) [Compilation RD Vol. I Tab F); Kinloch Vs HM Advocate [2013] 2 WLR 141 Pr 17-20) [Compilation RD Vol. I Tab G).***

These cases have been recently followed by UK Supreme court In ***Re JR38* (2016) AC 1131*[Compilation RD Vol. I Tab H)***. The majority view supported by Lord Toulson, Lord Hodge and Lord Clark in the context of Article 8 of the European Convention on Human Rights and Fundamental Freedoms has observed as below :-

> **"85.** *This passage highlights three matters: the width of the concept of private life; the purpose of article 8, i.e. what it seeks to protect; and the need to examine the particular circumstances of the case in order to decide whether, consonant with that purpose, the applicant had a legitimate expectation of protection in relation to the subject matter of his complaint. If so, it is then up to the defendant to justify the interference with the defendant's privacy.*
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> **86.** *In an impressive analysis of the scope of article 8, Laws LJ said in R (Wood) v Comr of Police of the Metropolis [2010] 1 WLR 123:*
>
> > *"20. The phrase 'physical and psychological integrity' of a person (the Von Hannover case 40 EHRR 1, para 50; S v United Kingdom 48 EHRR 1169, para 66) is with respect helpful. So is the person's 'physical and social identity': see S v United Kingdom , para 66 and other references there given. These expressions reflect what seems to me to be the central value protected by the right. I would describe it as the personal autonomy of every individual ...*
> >
> > *"21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the article 8 jurisprudence, this*

presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him—should make him—master of all those facts about his own identity, such as is name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the 'zone of interaction' (theVon Hannover case 40 EHRR 1, para 50) between himself and others ...

"22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think that there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's autonomy must (if article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for article 8.1's engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' (in any of the senses of privacy accepted in the cases). Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8.1 may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8.2. I shall say a little in turn about these three antidotes to the overblown use of article 8."

***87.** I have set out this passage at length because I agree with it and cannot improve on it. We are concerned in this case with the second of Laws LJ's qualifications—the "touchstone" of whether the claimant enjoyed on the facts a "reasonable expectation of privacy" or "legitimate expectation of protection". (I take the expressions to be synonymous.) In support of that part of his analysis Laws LJ cited Von Hannover v Germany at para 51 (set out above), Campbell v MGN Ltd [2004] 2 AC 457 and Murray v Express Newspapers plc [2009] Ch 481."*

7. The case In Re(Jr) 38 involved publishing of photographic images obtained from CCTV footage in journals and leaflets to be distributed for the purpose of identifying the young persons participating in riotous activity. Upholding the state action the court observed :-

*"**98**. I therefore do not agree with Lord Kerr JSC's suggestion (para 56) that the test of reasonable expectation of privacy (or legitimate expectation of protection), excludes from consideration such factors as the age of the person involved, the presence or absence of consent to publication, the context of the activity or the use to which the published material is to be put. The reasonable or legitimate expectation test is an objective test. It is to be applied broadly, taking account of all the circumstances of the case (as Sir Anthony Clarke MR said in Murray's case) and having regard to underlying value or values to be protected. Thus, for example, the publication of a photograph of a young person acting in a criminal manner for the purpose of enabling the police to discover his identity may not fall within the scope of the protection of personal autonomy which is the purpose of article 8, but the publication of the same photograph for another purpose might. Nor am I persuaded by Lord Kerr JSC's reading of Von Hannover (in para*

57 of his judgment) that the commission and the court treated dissemination to the general public as a self-standing test."

IV. PUBLIC DOMAIN [INFORMATION KNOWINGLY EXPOSED TO PUBLIC]

8. The U.S. cases also make a distinction based upon the spatial domain in which right to privacy is claimed , and this is notwithstanding the observation in **Katz Vs US 389 US 347 = 19 L Ed 2d 576 (1967) (telephone booth)** ***[Compilation RD Vol. I Tab E)*** that " the IVth Amendment protects- people and not simply areas-against unreasonable searches and seizures..."(Pg 583) . In fact, in ***Katz*** itself the court significantly stated "*what a person knowingly exposes to the public even in his own home or office is not a subject of IVth Amendment protection*" (Pg 582). In ***Katz,*** the Petitioner was making calls from a telephone booth in public place and the officials had placed a device outside the booth for overhearing. This was held entitled to protection of privacy as the Petitioner was speaking in privacy, though in a public place. The subsequent cases which grappled with information exposed to public are below: -

(i). In **US Vs Miller 425 US 435 = 48 L Ed 2d 71 (1976) [Bank records]** ***[Compilation RD Vol. I Tab A)*** , a case of defrauding the government of Whiskey tax Miller sought to prevent his documents with the bank from being obtained by the treasury department. The court held that these documents were not private papers and were business records of the bank. Rejecting the contention that the documents were given by him for a limited purpose (Pg 78) the court held that checks were not confidential communication but negotiable instruments and had been voluntarily conveyed to the Banks and exposed in the ordinary course of business. In such cases, the depositor takes the risk of conveyance of his information to the Government. It was observed:-

"(5) The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. United States Vs. White, 401 US 745, 751-752, 28 LEd 2d 453, 91 S Ct 1122 (1971). This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited

purpose and the confidence placed in the third party will not be betrayed".

(ii). In **Securities and Exchange Commission Vs. Jerry 467 US 735 = 81 L Ed 2d 615*[Compilation RD Vol. II Tab L)*** the court observed "It is established that, when a person communicates information to a third party even on the understanding that information is confidential, he cannot object if the third party conveys that information or record thereof to law enforcement authorities.

> "**5.** *Finally, respondents cannot invoke the Fourth Amendment in support of the Court of Appeals' decision. It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities. United States v. Miller, 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976). Relying on that principle, the Court has held that a customer of a bank cannot challenge on Fourth Amendment grounds the admission into evidence in a criminal prosecution of financial records obtained by the Government from his bank pursuant to allegedly defective subpoenas, despite the fact that he was given no notice of the subpoenas. Id., at 443, and n. 5, 96 S.Ct., at 1624, and n. 5. See also Donaldson v. United States, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed.2d 580 (1971) (Internal Revenue summons directed to third party does not trench upon any interests protected by the Fourth Amendment). These rulings disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers."*

(iii). In ***Richard M. Nixon Vs. Administrator of General Services 433 US 425 = 53 L Ed 2d 867[Compilation RD Vol. I Tab IJ)*** the court held that a person cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public.

> "**[23]** *The overwhelming bulk of the 42 million pages of documents and the 880 tape recordings pertain, not to appellant's private communications, but to the official conduct of his Presidency. Most of the 42 million pages were prepared and seen by others and were widely circulated within the Government. Appellant concedes that he saw no more than 200,000 items, and we do not understand him to suggest that his privacy claim extends to items he never saw. See United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). Further, it is logical to assume that the tape recordings made in the Presidential offices primarily relate to the conduct and business of the Presidency. And, of course, appellant cannot assert any privacy claim as to the documents and tape*

recordings that he has already disclosed to the public. United States v. Dionisio, 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973); Katz v. United States, supra, 389 U.S., at 351, 88 S.Ct., at 511. Therefore, appellant's privacy claim embracing, for example, 'extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictablets and his wife's personal files,' 408 F.Supp., at 359, relates only to a very small fraction of the massive volume of official materials with which they are presently commingled."

(iv). In ***United States Vs Antonio Dioniso 410 US 1 = 35 L Ed 2d 67[Compilation RD Vol. II Tab K)*** the court held that no person can have a reasonable expectation of privacy over sound of his voice which is constantly exposed to public.

(Pg. 79-80)

"[21,22] *"In Katz v. United States, supra, we said that the Fourth Amendment provides no protection for what 'a person knowingly exposes to the public, even in his own home or office . . ..' 389 U.S., at 351, 88 S.Ct., at 511. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:*

"Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large.' United States v. Doe (Schwartz), 2 Cir., 457 F.2d, at 898–899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber. "The interests in human dignity and privacy which

the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained.' Schmerber v. California, 384 U.S., at 769–770, 86 S.Ct., at 1835. Similarly, a seizure of voice exemplars does not involve the 'severe, though brief, intrusion upon cherished personal security,' effected by the 'pat down' in Terry—'surely . . . an annoying, frightening, and perhaps humiliating experience.' Terry v. Ohio, 392 U.S., at 24–25, 88 S.Ct., at 1882. Rather, this is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' Davis v. Mississippi, 394 U.S., at 727, 89 S.Ct., at 1398; cf. Thom v. New York Stock Exchange, D.C., 306 F.Supp. 1002, 1009."

(v). In ***Michael Lee Smith Vs Maryland 442 US 735 = 61 L Ed 2d 220 (1979) [Compilation RD Vol. I Tab B)*** a pen register was installed in the telephone company's office to record the numbers dialed from the telephone at Petitioner's home. This was done on police's request. The claim of privacy was rejected as the court doubted that people in general entertained any actual expectations in the numbers they dial. All telephone users realize that they must convey phone numbers to the telephone company since it is through Telephone Company's switching equipment that their calls are completed and based on that monthly bills are prepared. The site of the call being home was held to be immaterial. The court observed *"this court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties"* (Pg 229).

(vi). In ***California Vs Greenwood 486 US 35 = 100 L Ed 2d 30 [Compilation RD Vol. I Tab C)*** garbage had been placed outside the house for collection and the same was seized by the Narcotics department on a suspicion of use of prohibited substance . The court held that the garbage had been placed for conveying it to a third party and had been exposed to the public. Therefore, there could be no claim of privacy under the IVth Amendment. (Pg 36-37) .

(vii). In ***Florida Vs Riley 488 U.S. 445 = 102 L Ed 2d 835 [Compilation RD Vol. I Tab M)*** , Riley was growing marijuana in a

greenhouse which was not enclosed on two sides. The IO discovered the growing of marijuana from a helicopter. Similar was the case in ***California v. Ciraolo, 476 US 207 90 L Ed 2d 210.*** The court observed *" what a person knowingly exposes to public even in his own home or office is not a subject of IVth Amendment protection"* (Pg 841)

(viii). In **Oliver Vs US 466 US 170 (1984) = 80 L Ed 2d 214*[Compilation RD Vol. II Tab N)*** marijuana was grown in open field. The court held that there could be no legitimate expectation of privacy.

9. Dealing with adult theatres showing pornographic films the US Supreme Court in **Paris Adult Theatre Vs Lewis R. Slaton 37 L Ed 2d 446** ***[Compilation RD Vol. II Tab O)*** observed as below:-

"(21). Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).' Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Cf. Eisenstadt v. Baird, 405 U.S. 438, 453–454, 92 S.Ct. 1029, 1038 1039, 31 L.Ed.2d 349 (1972); id., at 460, 463–465, 92 S.Ct., at 1042, 1043–1044 (White, J., concurring); Stanley v. Georgia, supra, 394 U.S., at 568, 89 S.Ct., at 1249; Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct., 1817, 1823; 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, supra, 381 U.S., at 486, 85 S.Ct., at 1682; Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). Nothing, however, in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation".

"(22-25)... the idea of "privacy" right and a place of public accommodation are, in this context mutually exclusive.."

10. The same view was taken in **United States Vs George Joseph Orito 37 L Ed 2d 513*[Compilation RD Vol. II Tab PQ)*** where obscene material was being transported by means of a common carrier. It was observed :-

" But viewing obscene films in a commercial theatre open to the adult public, see Paris Adult Theatre I V Slaton, 413 US, at 65-67, 37 L Ed 2d 461-462, or transporting such films in common

> *carriers in interstate commerce, has no claim to such special consideration. It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public".*

11. Even our court has held in ***Rajagopal (1994) 6 SCC 632***, the case of Auto Shankar that once an information is in public record then there is no privacy right (Pr 29).

12. In ***Veronica School Vs Wayne Acton, 515 US 646=132 L Ed 2d 564 [Compilation RD Vol. I Tab A)*** where children wishing to take part in athletics were subjected to random urinanalysis drug testing , the court observed :-

> *"The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." T.L.O., 469 U.S., at 338, 83 L Ed 2d 720, 105 S Ct 733, . What expectations are legitimate varies, of course, with context, id., at 337, 83 L Ed 2d 720, 105 S Ct 733, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State".*

The court held that the student athletes have a reduced expectation of privacy (Pg 577).

13. In ***Whalen Vs Richard Roe 429 US 589 (1977) = 51 L Ed 2d 64 [Compilation RD Vol. II Tab S)*** the state of New York was recording in a centralized computer file the names and addresses of all persons who obtained certain drugs under doctor's prescription. The court held that "requiring such disclosure to representatives of the States having responsibility of the health of the community does not amount to an impermissible invasion of privacy." In a concurring judgment, Justice Stewart observed that "there is no general constitutional right to privacy and that whatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from

disclosure of private information" (Pg 78-79). With this, the State action was upheld.

V. DIGITAL DATA

14. From the above judgments it is evident that there can be no claim for privacy with regard to personal data and information which has already been voluntarily transferred by a person on account of use of modern technologies comprising the laptops, smart phones etc. So far, as photographs, thumb impressions and iris scans are concerned they are already substantially in the public domain and are available with the websites, service providers, application owners, aggregators etc. These information are being transmitted on a daily basis to the above resources during the course of e-commerce. Much of the data and information is transmitted unconditionally. It is submitted that with respect to such data there could be no claim of privacy.

15. Where the transference of personal data is not merely to a third party for a limited purpose but to several parties on a regular basis the principle of "contextual integrity" (or limited purpose) which a few proponents of privacy in public domain are projecting [" Protecting Privacy in an information age : The problem of Privacy in Public by Helen Nissenbaum] would also not result in a valid claim of privacy.

VI. IDENTITY DATA

16. Even otherwise, providing thumb impressions as identity information has been in vogue and have been used in India since long in execution of documents, particularly sale deeds and other similar transfer documents. Of late, it is compulsory to append photographs and to put thumb impressions while getting documents registered. Personal identity data is also required to be disclosed along with photo graph(biometrics) in obtaining passport, driving license, bank account , for checking in hotels and obtaining identity passes for

entering into public institutions. Consequently, there cannot be any claim of Fundamental Right to privacy in disclosing personal data for identification. There cannot be any claim of anonymity when citizens step out of their homes to enter into various kinds of social, economic and political relations, to obtain benefits and services, to enter into contracts or to discharge legal obligations such as tax. In fact, even to claim fundamental right under Article 19 a person would have to establish that he is a "citizen" and for this he will have to disclose personal data for identification. Rule 12 (2) (i) (a) of the Supreme Court Rules, 2013 dealing with PIL provides that the petitioner shall disclose his full name, complete postal address, email address, phone number, proof regarding personal identification, occupation and annual income, PAN number and National Unique Identity Card number, if any:

17. A survey of U.S. Supreme Court judgments would show that the Constitution of USA has been understood as protecting the right to privacy of people in their " persons, houses, papers and effects" as early as 1923, in ***Charlie Hester Vs United States of America 68 L Ed 894 [Compilation RD Vol. II Tab T)***, Justice Holmes observed "*the special protection accorded by the IVth Amendment to the people in their persons, houses, papers and effects is not extended to open field*" . Even Article 12 of the Universal Declaration of the Human Rights and Article 17 of the International Covenant on Civil and Political Rights only talk about arbitrary and unlawful interference with " his privacy, family, home or correspondence." and about protection from " unlawful attacks on his honor and reputation". These instruments therefore do not expand the right to privacy in generality or abstract nor do they extend the right to privacy beyond the domain which is private/private like and confidential. They do not bring within their coverage that which has been voluntarily and unconditionally exposed to the public domain not to that which pertains to identity disclosure in context of social, economic and political relations.

VII. HUMAN RIGHTS CONVENTIONS

18. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950- European Convention also provides only for respect for his private and family life, his home and his correspondence. Similar, is the position with regard to of the Schedule I of the U.K. Human Rights Act, 1998. Clearly, these conventions do not extend in the public domain especially when the information has been transmitted to such domain willingly and unconditionally. In the context of Article 8 of European Convention for the protection of Fundamental Rights and Human Freedoms, the UK Supreme Court in the case of **Kinloch Vs HM Advocate [2013] 2 WLR 141*[Compilation RD Vol. I Tab G)*** held as below :-

> ***19.*** *There is a zone of interaction with others, even in a public context, which may fall within the scope of private life: PG Vs. United Kingdom 46 EHRR 1272, para 56. But measures effected in a public place outside the person's home or private premises will not, without more, be regarded as interfering with his right to respect for his private life. Occasions when a person knowingly or intentionally involves himself in activities which may be recorded or reported in public, in circumstances where he does not have a reasonable expectation of privacy, will fall into that category: PG Vs. United Kingdom , para 57. A person who walks down a street has to expect that he will be visible to any member of the public who happens also to be present. So too if he crosses a pavement and gets into a motor car. He can also expect to be the subject of monitoring on closed circuit television in public areas where he may go, as it is a familiar feature in places that the public frequent".*

Having so observed, the court held that the Appellant was moving openly in the public view and there was nothing in the case to suggest that he could " reasonable have had any such expectation of privacy". He took the risk of being seen and of his movements being noted down so there was infringement of Article 8.

VIII. DUALITY OF PERSONAL INFORMATION

19. As regards, personal information of any kind, as long as the information is with the person himself and in his private domain there would be two distinct rights simultaneously embedded. One is his right to privacy which entitles him

not to part with the information (barring identity information). The second, is right to property in the said information. To illustrate a person can pen down all his information in the autobiography which can then be transferred by sale to the public in the form of a book or biopic. But once the person has transmitted his personal information willingly in the public domain by exercising his right to speech and expression then he would definitely lose the first right to privacy. The only issue would be how far and how much right to property he would retain in his own information after transmission but those issues would be only issues of property and not privacy. The fears with regard to data mining and data colonization as being creative of monopolies, injurious to competition and issues of ownership would all fall in the realm of property rights.

20. It is also to be noted that when a person transmits personal information to the public domain he is actually exercising his fundamental right to speech and expression under Article 19(1) (a). Therefore, it is for the person concerned to express himself clearly and ensure that he puts conditions for retaining whatever privacy rights or he should refrain from giving information in the information. Largely, this would be in the realm of contract and it would depend upon mutual bargains as to whether the person would be in a position to put a condition. But where such an information is transmitted willingly and unconditionally in the public domain to third parties and on a regular basis there would be no right to privacy.

IX. CLASH WITH OTHER FUNDAMENTAL RIGHTS

21. Yet again, a claim of privacy can get wiped out and overridden in a situation of clash with another person's fundamental right. It has been so ruled in the following cases :

(i). ***X Vs Hospital Z (1998) 8 SCC 296 (Pr. 21-29)***

In this case our Supreme Court held that right to privacy does exist outside the confines of home and it was not absolute. But this was in the context of a confidential relationship with the hospital and the information was sensitive. The exposure of which would have stigmatized. However, in the context of marriage SC held that the right to privacy of a person suffering from AIDS would be overridden on account of the right to life of the person with whom marriage was to be solemnized. Both rights were within Article 21.

(ii). ***(2003) 4 SCC 399, PUCL Vs UOI (Pr. 121)***

This case involved disclosure of assets and liabilities of the spouse by an election candidate. It was held that the claim of right to privacy would be overridden by the right to information of citizens.

22. When a minimal identity disclosure is legislatively required in the context of delivery of benefits and services by the Government or a public body then the seeker of benefit and service would not be entitled to any Fundamental Right to privacy with regard to identity disclosure. More so if the benefit and service is a targeted one, that is to say that it is intended to a defined class of persons. A welfare State is constitutionally obliged to undertake such exercise. The provision of benefits and services would actually enliven the Fundamental Right to life and personal liberty of the poorer and the weaker section of the society. It is not enough to protect Article 21 of the persons who have the means and the haves it is more important to ensure that the benefits and service those who are truly have nots and deserving. This involves identification. In context of reservations this court has held evolved the concept of creamy layer in order that benefits of reservation may flow to those who are truly backward. The State has been obliged to undertake identification of the truly backward.

(1992) Suppl 3 SCC 212 Indra Sawney Vs UOI (Pr.792 & 793)

23. It is submitted that even assuming that there is some privacy right even in the minimal identity disclosure for identification. The same would be overridden by the Fundamental Right of those persons to whom the targeted benefits are meant to flow.

X. CONTOURS

24. The plea that the court should refrain from specifying the contours of fundamental right to privacy and it should be left to be developed on a case to case basis ought not to be expected. It is absolutely essential to delineate the right to privacy and the nature of limitations of the State. The modern Indian State faced with complex problems arising from illegal immigration, crime, terrorism, corruption, fraud etc is also Constitutionally charged with securing a social order in which Justice, Social, Economic and Political informs all the institutions of National Life, and that the material resources of the community are so distributed as best to subserve the common good (Article 38 & 39). India is a Welfare State.

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (Per Khanna J)

> *"**1475.** Apart from what has been stated above about the effect of preamble on the power of amendment, let us deal with the provisions of the preamble itself. After referring to the solemn resolution of the people of India to constitute India into a sovereign democratic republic, the preamble makes mention of the different objectives which were to be secured to all its citizens.*
> ***These objectives are:***
> ***JUSTICE, social, economic, and political;***
> ***LIBERTY of thought, expression, belief, faith and worship;***
> ***EQUALITY of status and of opportunity; and to promote among them all;***
> ***FRATERNITY assuring the dignity of the individual and the unity of the Nation.***
> *It would be seen from the above that the first of the objectives mentioned in the preamble is to secure to all citizens of India Justice, social, economic and political. Article 38 in Part IV relating to the Directive Principles of State Policy recites that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.*

1476. *Since the latter half of the eighteenth century when the idea of political equality of individuals gathered force and led to the formation of democratic Governments, there has been a great deal of extension of the idea of equality from political to economic and social fields. Wide disparaties in the standard of living of the upper strata and the lower strata as also huge concentration of wealth in the midst of abject poverty are an index of social mal-adjustment and if continued for long, they give rise to mass discontent and a desire on the part of those belonging to the lower strata to radically alter and, if necessary, blow up the social order. As those belonging to the lower strata constitute the bulk of the population, the disparities provide a fertile soil for violent upheavals. The prevention of such upheaval is not merely necessary for the peaceful evolution of society, it is also in the interest of those who belong to the upper strata to ensure that the potential causes for violent upheaval are eliminated. Various remedies have been suggested in this connection and the stress has been laid mainly upon having what is called a welfare state. The modern states have consequently to take steps with a view to ameliorate the conditions of the poor and to narrow the chasm which divides them from the affluent sections of the population. For this purpose the State has to deal with the problems of social security, economic planning and industrial and agrarian welfare. Quite often in the implementation of these policies, the State is faced with the problem of conflict between the individual rights and interests on the one side and rights and welfare of vast sections of the population on the other. The approach which is now generally advocated for the resolving of the above conflict is to look upon the rights of the individuals as conditioned by social responsibility. Harold Laski while dealing with this matter has observed in Encyclopaedia of the Social Sciences:*

"The struggle for freedom is largely transferred from the plane of political to that of economic rights. Men become less interested in the abstract fragment of political power an individual can secure than in the use of massed pressure of the groups to which they belong to secure an increasing share of the social product .... so long as there is inequality, it is argued, there cannot be liberty. The historic inevitability of this evolution was seen a century ago by de Tocqueville. It is interesting to compare this insistence that the democratization of political power mean equality and that its absence would be regarded by the masses as oppression with the argument of Lord Acton that liberty and equality are antitheses. To the latter liberty was essentially an autocratic ideal; democracy destroyed individuality, which was the very pith of liberty, by seeking identity of conditions. The modern emphasis is rather towards the principle that material equality is growing inescapable and that the affirmation of personality must be effective upon an immaterial plane." (see Vol. IX, p. 445).

1477. *I may also refer to another passage on p. 99 of Grammar of Politics by Harold Laski:*

"The state, therefore, which seeks to survive must continually transform itself to the demands of men who have an equal claim upon that common welfare which is its ideal purpose to promote.

We are concerned here, not with the defence of anarchy, but with the conditions of its avoidance. Men must learn to subordinate their self-interest to the common welfare. The privileges of some must give way before the rights of all. Indeed, it may be urged that the interest of

the few is in fact the attainment of those rights, since in no other environment is stability to be assured."

1478. *A modern State has to usher in and deal with large schemes having social and economic content. It has to undertake the challenging task of what has been called social engineering, the essential aim of which is the eradication of the poverty, uplift of the downtrodden, the raising of the standards of the vast mass of people and the narrowing of the gulf between the rich and the poor. As occasions arise quite often when the individual rights clash with the larger interests of the society, the State acquires the power to subordinate the individual rights to the larger interests of society as a step towards social justice. As observed by Roscoe Pound on p. 434 of Volume I of Jurisprudence under the heading "Limitations on the Use of Property":*

"Today the law is imposing social limitations — limitations regarded as involved in social life. It is endeavouring to delimit the individual interest better with respect to social interests and to confine the legal right or liberty or privilege to the bounds of the interest so delimited."

To quote the words of Friedmann in Legal Theory:

"But modern democracy looks upon the right to property as one conditioned by social responsibility by the needs of society, by the 'balancing of interests' which looms so large in modern jurisprudence, and not as pre-ordained and untouchable private right." (Fifth Edition, p. 406).

1479. *With a view to bring about economic regeneration, the State devises various methods and puts into operation certain socio-economic measures. Some of the methods devised and measures put into operation may impinge upon the property rights of individuals. The courts may sometimes be sceptical about the wisdom behind those methods and measures, but that would be an altogether extraneous consideration in determining the validity of those methods and measures. We need not dilate further upon this aspect because we are only concerned with the impact of the preamble. In this respect I find that although it gives a prominent place to securing the objective of social, economic and political justice to the citizens, there is nothing in it which gives primacy to claims of individual right to property over the claims of social, economic and political justice. There is, as a matter of fact, no clause or indication in the preamble which stands in the way of abridgement of right to property for securing social, economic and political justice. Indeed, the dignity of the individual upon which also the preamble has laid stress, can only be assured by securing the objective of social, economic and political justice."*

25. Therefore, when a claim of privacy seeks inclusion in Article 21 of the Constitution of India the court needs to apply the reasonable expectation of privacy test. It should see :-

(i). What is the context in which a privacy law is set up.

(ii). Does the claim relate to private or family life, or a confidential relationship.

(iii). Is the claim serious one or is it trivial.

(iv). Is the disclosure likely to result in any serious or significant injury and the nature and extent of disclosure.

(v). Is disclosure for identification purpose or relates to personal and sensitive information of an identified person.

(vi). Does disclosure relate to information already disclosed publicly to third parties or several parties willingly and unconditionally. Is the disclosure in the course of e commerce or social media?

26. Assuming, that in a case that it is found that a claim for privacy is protected by Article 21 of the Constitution the test should be following:-

(i). the infringement should be by legislation

(ii). the legislation should be in public interest.

(iii). the legislation should be reasonable and have nexus with the public interest.

(iv). the State would be entitled to adopt that measure which would most efficiently achieve the objective without being excessive

(v). if apart from Article 21 the legislation infringes any other specified Fundamental Right then it must stand the test in relation to that specified Fundamental Right.

(vi). Presumption of validity would attach to the legislations

27. It ought not to be accepted that the right to privacy flows collectively from various Fundamental Rights, for then the legislation in every case have to satisfy the test in relation to all the Fundamental Rights. Our Constitution has specified Fundamental Rights in different articles and the limitations on the State with respect to them has different contours. Hence it is more appropriate to hold that if the claim of privacy is in the penumbra the specified fundamental right then it must satisfy the test in relation to that specified fundamental right alone. Where a claim of privacy is not within the penumbra of a specified fundamental right then it should first establish itself as being embedded in Article 21 and the test would be whether the expectation of privacy could be

considered to be reasonably legitimate, and further is not overridden by any competing fundamental right.

XI. DUE PROCESS AND COMPELLING STATE INTEREST

28. The test of compelling state interest derived from US cases should not be adopted. In **Gobind** (supra) this court referred to ***Griswold*** and ***Roe Vs Wade*** and adopted the compelling State interest test. para 31 is as below :

> ***"31.*** *Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As Regulation 856 has the force of law,it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions contained in it: for, what is guaranteed under that article is that no person shall be deprived of his life or personal liberty except by the procedure established by "law". We think that the procedure is reasonable having regard to the provisions of Regulations 853(c) and 857. Even if we hold that Article 19(1)(d) guarantees to a citizen a right to a privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid".*

29. It is submitted that the "compelling state interest" test is an evolution from the US Constitution, particularly the XIVth Amendment which injuncts deprivation of "any person of life, liberty or property without due process of law". Based on this due process requirement the US Supreme Court has in American historical context evolved the test of strict scrutiny of compelling state interest, and narrow tailoring or over breath or least drastic means. Our Constitution of India does not incorporate the due process provision. The same was specifically discarded by the Constituent Assembly (**enclosed as Annexure C**). In ***Mohd. Arif Vs. Supreme Court (2014) 9 SCC 737*** Justice R.F. Nariman traced the history of Article 21, referred to the Constituent

Assembly Debates and the Maneka Gandhi case, and concluded that "Substantive Due Process" is now to be applied to the fundamental right to life and liberty (Pr. 17-28). But it is notable that this Court has said that in the context of Maneka Gandhi test of "reasonable, just and fair". So ever after the judgment of ***Maneka Gandhi (1978) 1 SCC 248*** the only requirement under Article 21 is that the law should be *reasonable, just and fair.*

In **Maneka Gandhi's** case the principle of reasonableness or non arbitrariness was drawn into Article 21 from Article 14.

> "**7**...*The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it .would be no procedure at all and the requirement of Article 21 would not be satisfied."*

30. In ***Bachan Singh Vs State of Punjab (1980) 2 SCC 684*** , a Constitution Bench observed

> "**136.** Article 21 reads as under:
>
> "*No person shall be deprived of his life or personal liberty except according to procedure established by law."*
>
> *If this Article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi, it will read as follows:*
>
> *"No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law."*
>
> *In the converse positive form, the expanded Article will read as below:*
>
> *"A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law."*
>
> *Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the founding fathers recognised the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.*"

31. In **Sunil Batra Vs. Delhi Administration (1978) 4 SCC 494** dealing with solitary confinement after conviction and award of death sentence, Desai, J., speaking for the majority observed in para 228 " *the word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in Maneka Gandhi's case that the law must be right, just and fair and not arbitrary, fanciful or oppressive."*

Krishna Iyer, J., in a concurring judgment observed in para 52 " *true, our Constitution has no due process clause or the VIIIth Amendment; but in this branch of law after Cooper and Maneka Gandhi the consequence is the same".*

The majority of the judges do not hold so. Subsequently, in ***(1983) 2 SCC 277, Mithu Vs State of Punjab*** Chandrachud CJ speaking for a CB referred to both the views in **Sunil Batra** and finally observed as below :-

> "**6.** *These decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the courts to follow it; that it is for the legislature to provide the punishment and for the courts to impose it. Two instances, undoubtedly extreme, may be taken by way of illustration for the purpose of showing how the courts are not bound, and are indeed not free, to apply a fanciful procedure by a blind adherence to the letter of the law or to impose a savage sentence. A law providing that an accused shall not be allowed to lead evidence in self-defence will be hit by Articles 14 and 21. Similarly, if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21. These are, of course, extreme illustrations and we need have no fear that our legislatures will ever pass such laws. But these examples serve to illustrate that the last word on the question of justice and fairness does not rest with the legislature. Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable. The question which then arises before us is whether the sentence of death, prescribed by Section 303 of the Penal Code for the offence of murder committed by a person who is under a sentence of life imprisonment, is arbitrary and oppressive so as to be violative of the fundamental right conferred by Article 21."*

This CB does not endorse the equation of Article 21 with due process clause as in the American Constitution

32. In ***State of A.P. v. McDowell & Co*** (1996) 3 SCC 709 this court held that the doctrine substantive due process is inapplicable to our Constitution.

> ***"43.....*** *As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.* ***We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness — concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above.*** *In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary** or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom...."*

33. Similar view was expressed in ***A.K. Roy v. Union of India, (1982) 1 SCC 271*** **(5JJ)**

> ***35.*** *The fact that England and America do not resort to preventive detention in normal times was known to our Constituent Assembly and yet it chose to provide for it, sanctioning its use for specified purposes. The attitude of two other well-known democracies to preventive detention as a means of regulating the lives and liberties of the people was undoubtedly relevant to the framing of our Constitution. But the framers having decided to adopt and legitimise it, we cannot declare it unconstitutional by importing our notions of what is right and wrong.* ***The power to Judge the fairness and justness of procedure established by a law for the purposes of Article 21 is one thing: that power can be spelt out from the language of that article. Procedural safeguards are the handmaids of equal***

justice and since, the power of the government is colossal as compared with the power of an individual, the freedom of the individual can be safe only if he has a guarantee that he will be treated fairly. The power to decide upon the justness of the law itself is quite another thing: that power springs from a 'due process' provision such as is to be found in the 5th and 14th Amendments of the American Constitution by which no person can be deprived of life, liberty or property "without due process of law".

36. *Insofar as our Constitution is concerned, an amendment was moved by Pandit Thakur Dass Bhargava to draft Article 15, which corresponds to Article 21 of the Constitution, for substituting the words "without due process of law" for the words "except according to procedure established by law". Many members spoke on that amendment on December 6, 1948, amongst whom were Shri K.M. Munshi, who was in favour of the amendment, and Sir Alladi Krishnaswamy Ayyar who, while explaining the view of the Drafting Committee, said that he was "still open to conviction". The discussion of the amendment was resumed by the Assembly on December 13, 1948 when Dr Ambedkar, who too had an open mind on the vexed question of 'due process', said:*

> *"... I must confess that I am somewhat in a difficult position with regard to Article 15 and the amendment moved by my friend Pandit Bhargava for the deletion of the words 'procedure according to law' and the substitution of the words 'due process'.*
>
> * * *
>
> *The question of 'due process' raises, in my judgment, the question of the relationship between the legislature and the judiciary. In a federal constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature.... The 'due process' clause, in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law.... The question now raised by the introduction of the phrase 'due process' is whether the judiciary should be given the additional power to question the laws made by the State on the ground that they violate certain fundamental principles.*
>
> *...There are dangers on both sides. For myself I cannot altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature and by dint of their own individual conscience or their bias or their prejudices be trusted to determine which law is good and which law is bad. It is rather a case where a man has to sail between Charybdis and Scylla and I therefore would not say anything. I would leave it to the House to decide in any way it likes. (See Constituent Assembly Debates, Vol. VII, pp. 999-1001)*

The amendment was then put to vote and was negatived. In view of this background and in view of the fact that the Constitution, as originally

conceived and enacted, recognizes preventive detention as a permissible means of abridging the liberties of the people, though subject to the limitations imposed by Part III, we must reject the contention that preventive detention is basically impermissible under the Indian Constitution."

34. This view was also recently endorsed in ***Rajbala v. State of Haryana, (2016) 2 SCC 445*** **2JJ**

> ***64.*** *From the above extract from McDowell & Co. case it is clear that the courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is "arbitrary" since such an exercise implies a value judgment and courts do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution.* ***To undertake such an examination would amount to virtually importing the doctrine of "substantive due process" employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation. As pointed out in the above extract, even in United States the doctrine is currently of doubtful legitimacy. This Court long back in A.S. Krishna v. State of Madras declared that the doctrine of due process has no application under the Indian Constitution.*** *As pointed out by Frankfurter, J., arbitrariness became a mantra.*

35. Judgments delivered by this court prior to **Maneka Gandhi** rejecting the American due process are enclosed as **Annexure B** ***[Compilation RD Vol. III Tab T].***

36. Our Court has in the context of Article 19 explained the test of reasonableness in ***State of Madras Vs. V.G.Row 1952 SCR 597***, ***Bishambhar Dayal Chandra Mohan V. State of U.P. (1982) 1 SCC 39***, ***Bennet Coleman Vs. CIT (1972) 2 SCC 788***. All that is to be seen, therefore, in the context of Article 21 is as to whether 1) law is competently made 2) it has proximate connection with public interest 3) restriction is not excessive.

In V.G. Row case Patanjali Sastri C.J. observed as below:-

> *"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the*

prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit of their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable."

(1978) 2 SCC 1,Pathumma V. State of Kerela (Pr 8-26) (7JJ)

37. Our courts have repeatedly cautioned against mechanical implantation of American Jurisprudence into our constitution.

(1955) 2 SCR 589 @ 599, Bikaji Narain Dhakras Vs. State of M.P.

1957 SCR 399 @ 412, A.S. Krishna Vs. State of Madras

1962 Supp (3) SCR 369 @ 378, Kameshwar Prasad Vs. State of Bihar.

(1978) 2 SCC 1,Pathumma V. State of Kerela (Pr.23)

(2008) 6 SCC 1, Ashoka Kumar Thakur Vs. Union of India (Pr.188,190, 252 & 253)

38. That as regards the procedure contemplated by Article 21, this court observed in Maneka Gandhi's case as follows(Pr. 7) :-

Bhagwati,J. :

"The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it .would be no procedure at all and the requirement of Article 21 would not be satisfied".

Chandarchud, J.

"But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary".

Krishna Iyer, J. :

*"**82.** So I am convinced that to frustrate Article 21 by relying on any formal adjectival statute, however, flimsy or fantastic its provisions be, is to rob what the constitution treasures".*

*"**85.** To sum up, "procedure" in Article 21 means fair, not formal procedure. "Law" is reasonable law, not any enacted piece".*

39. In view of Maneka Gandhi's case the principle for testing the law infringing the right to privacy would only be "is the law reasonable, just and fair, and in the public interest". There is no justification for importing compelling state interest and the other principles associated with it.

40. In ***Illinois State Board of Elections V. Socialist Workers Party, 440 US 173= 59 L.Ed.2d 230[Compilation RD Vol. II Tab U),*** Justice Blackmun, while concurring, expressed his deep unease with the test of compelling state interest "least drastic means". He observed (Pg.244):

> *"Although I join the Court's opinion and its strict-scrutiny approach for election cases, I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling [state] interest" and "least drastic [or restrictive] means." See, ante, at 184, 185, and 186. I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification".*

Some other judges concurring with majority only adopted the "rational connection with state interest" test.

41. In fact in **Veronica School Vs Acton 515 US 646=132 L Ed 2d 513 *[Compilation RD Vol. II Tab R)***, the Petitioner's contention for a less intrusive means was not accepted and the court observed :

" *We have repeatedly refuse to declare that only the least intrusive search practicable can be reasonable under the IVth Amendment*".

42. In view of the aforesaid the judgment the test of compelling state interest adopted in ***Gobind V. State of Madhya Pradesh (1975) 2 SCC 148*** needs to be discarded.

ORDERED LIBERTY :

43. Liberty is not licence for anarchy, chaos and disorder. It assumes for its existence an ordered environment. In ***Gobind*** our Court talked of "Ordered Liberty".

44. To illustrate issuance of passes or proximity cards for entry in institutions to enable orderly functioning actually enhances exercise of Liberty.

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